In the Supreme Court of the United States

OCTOBER TERM, 1973

Supreme Court, U. S.
FILED
APR 11 1974
MICHAEL RODAK, JR., CLERK

No. 73-690

AIR POLLUTION VARIANCE BOARD OF THE STATE OF COLORADO,
Petitioner,

vs.

WESTERN ALFALFA CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF COLORADO

BRIEF FOR THE RESPONDENT

GEORGE D. BLACKWOOD, JR.
PHILIP B. GREEN
Floor Three Columbia Union Bank Building
900 Walnut Street
Kansas City, Missouri 64106

DONALD D. CAWELTI
990 Public Service Company Building
Denver, Colorado 80202
Attorneys for Respondent

Of Counsel:
LINDE THOMSON VAN DYKE FAIRCHILD & LANGWORTHY
Floor Three Columbia Union Bank Building
900 Walnut Street
Kansas City, Missouri 64106

LEE, BRYANS, KELLY & STANSFIELD
990 Public Service Company Building
Denver, Colorado 80202

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-2020

INDEX

I. QUESTIONS PRESENTED 1

II. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

III. STATEMENT OF THE CASE 5

IV. SUMMARY OF ARGUMENT 6

V. ARGUMENT 10

A. The Act, As Applied to Respondent, Permitted Action to Be Taken Which in Effect, Denied Respondent a Real and Reasonable Opportunity to Present Evidence and Be Heard at the Hearing, and Operated to Deny a Hearing on the Facts, and Is Therefore Violative of Respondent's Right to Procedural Due Process As Guaranteed by the Fourteenth Amendment to the Constitution of the United States 10

B. The Taking of Opacity Readings on the Premises of Respondent, a Stationary Emission Source, Without Either a Search Warrant or the Consent or Knowledge of Anyone Representing the Respondent, Constituted an Unreasonable Seizure under the Fourth Amendment to the Constitution of the United States 24

1. Preliminary Comment 24

2. The Taking of on Premises Opacity Readings Is Governed by the Decisions in *Camara* and *See* and Does Not Fall Within the Carefully Defined Exceptions to Those Decisions 26

3. The "Plain View" and "Open Fields" Doctrines Do Not Apply to Opacity Readings Taken on Respondent's Premises 40

C. The Former Air Pollution Control Act in and of Itself and As Applied to the Respondent in This Action Is Unconstitutional in That It Works in Such a Manner As to Deprive the Respondent of Its Property in Contravention of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States 43

1. The Tests Employed in the Former Act for Determining Whether the Maximum Permissible Discharges for Air Contaminants Have Been Exceeded Are Arbitrary, Capricious and Unreasonable and Are So Subjective As to Offend Traditional Notions of Fair Play and Substantial Justice 43

2. The Act, in Employing Visual Determination Tests, Has Selected Means Which Have No Real and Substantial Relation to the Object Sought to Be Attained and Is Therefore Violative of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States 56

3. Whatever the End Sought to Be Attained by the Act, a Finding of Liability for Its Violation Based upon a Visual Determination Test Is Unreasonable and Therefore Violative of Due Process 61

VI. CONCLUSION 65

Citations

CASES

Bell v. *Burson*, 402 U. S. 535 (1971) 60

Bortz Coal Company v. *Air Pollution Commission*, 279 A. 2d 388 (1971) 59

Camara v. *Municipal Court*, 387 U. S. 523 (1967) 8, 23, 24, 25, 26, 27, 29, 30, 31, 32, 34, 37, 41

Capler v. *City of Greenville, Mississippi*, 298 F. Supp. 295 (N.D. Miss. 1969) 18

City of Portland v. *Lloyd A. Fry Roofing Company*, 495 P. 2d 751 (1972) 53

Colonnade Catering Corp. v. *United States*, 397 U. S. 72 (1970) 31, 32, 34, 35, 37

Escalera v. *New York City Housing Authority*, 425 F. 2d 853 (2d Cir. 1970) 11, 14

Essex Chemical Corporation v. *Ruckelshaus*, 486 F. 2d 427 (D.C. Cir. 1973) 51

Fullbright v. *United States*, 392 F. 2d 432 (10th Cir. 1968) 41, 42

Greene v. *McElroy*, 360 U. S. 474 (1959) 13

Goldberg v. *Kelly*, 397 U. S. 254 (1970) 11

Hannah v. *Larche*, 363 U. S. 420 (1960) 13

Harris v. *United States*, 390 U. S. 234 (1968) 41

Joint Anti-Fascist Refugee Committee v. *McGrath*, 341 U. S. 123 (1951) 23-24

Katz v. *United States*, 389 U. S. 347 (1967) 42

Lloyd A. Fry Roofing Co. v. *State Department of Health, et al.*, 499 P. 2d 1176 (Colo. 1972) 38, 39

McDowell v. *United States*, 383 F. 2d 599 (8th Cir. 1967) 42

Morgan v. *United States*, 304 U. S. 1 (1938) 12

Nebbia v. *New York*, 291 U. S. 515 (1934) 56, 57

Ohio Bell Telephone Company v. *Public Utilities Commission*, 301 U. S. 292 (1937) 12

Pearson v. *Northeast Airlines*, 309 F. 2d 553 (2d Cir. 1962) 61

Pennsylvania v. *Pennsylvania Power Company*, 6 E.R.C. 1328 (1974) 20

People v. *Detroit Edison Company*, 168 N.W. 2d 320 (1969) 59
People v. *Plywood Manufacturers of California*, 291 P. 2d 587 (1955) 54
Portland Cement Association v. *Ruckelshaus*, 486 F. 2d 375 (D.C. Cir. 1973) 43-44, 45
See v. *City of Seattle*, 387 U. S. 541 (1967) 26, 27, 30, 31, 34, 36, 38
United States v. *Biswell*, 406 U. S. 311 (1972) 28, 31, 32, 33, 34, 35, 36, 37
United States v. *Business Builders, Inc.*, 354 F. Supp. 141 (N.D. Okla. 1973) 39
United States v. *Capps*, 435 F. 2d 637 (9th Cir. 1970) 41
United States v. *Del Campo Baking Mfg. Co.*, 345 F. Supp. 1371 (D. Del. 1972) 34, 35, 36, 37, 39
United States v. *Duffy*, 282 F. Supp. 77 (S.D. N.Y. 1968) 40
United States v. *Litvin*, 353 F. Supp. 1333 (D. D.C. 1973) 34-35, 37, 39
United States v. *Thriftimart, Inc.*, 429 F. 2d 1006 (9th Cir. 1970) 40
United States v. *Vilhotti*, 452 F. 2d 1186 (2d Cir. 1971) .. 41
Vlandis v. *Kline*, ... U. S. ....., 93 S. Ct. 2230 (1973) .. 60
Youghiogheny and Ohio Coal Co. v. *Morton*, 364 F. Supp. 45 (S.D. Ohio 1973) 38

CONSTITUTION OF THE UNITED STATES

Fourth Amendment 2, 24, 25, 27, 31, 32, 33, 35, 36, 39, 41, 42, 43
Fourteenth Amendment 2, 39, 59

STATUTES

42 U.S.C. Section 1857c-9 22

California Health and Safety Code—

Sections: 24198 59
24199 59

Colorado Revised Statutes (C.R.S.) 1963 (1967 Perm. Supp.)—

Sections: 66-29-2 2
66-29-3 (5) 52
66-29-3 (6) 3
66-29-5 (2) (6) 3
66-29-5 (2) (b) 45
66-29-5 (2) (c) 4, 45
66-29-8 (2) (d) 4, 7, 10, 28
66-29-9 19
66-29-15 23

35 Pennsylvania Statutes § 4002 58

San Francisco Housing Code, (1967) Section 503 29

MISCELLANEOUS

Henz, "The Ringelmann Numbers As an Irrebuttable Presumption of Guilt—As Outdated Concept," 3 Natural Resources Lawyer 232, May, 1970 46

Marks, *Standard Handbook for Mechanical Engineers*, 7th Ed., McGraw-Hill Book Co., New York, 1969 48

"Particulate Emissions from Alfalfa Dehydrating Plants-Control Costs and Effectiveness"—Environ. Pro. Tech. Series, EPA 650/-2-74-007, Jan. 1974 50

Public Health Service Publication 999-Ap.-30 (1967 Nat. Tech. Info. Serv. PB-174-705) 51

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-690

AIR POLLUTION VARIANCE BOARD
OF THE STATE OF COLORADO,
Petitioner,

vs.

WESTERN ALFALFA CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF COLORADO

BRIEF FOR THE RESPONDENT

I. QUESTIONS PRESENTED

1. Is a person charged with an air pollution violation afforded procedural due process when the only evidence to support the charge is the uncorroborated observation of an investigator made, pursuant to statutory authority, without the knowledge of the accused which thereby foreclosed the accused of any opportunity to present its own evidence as to the nature (opacity) of the emissions at the particular time of the investigator's observations?

2. Does the taking of opacity readings on the premises of an emission source without either a search warrant or the consent or knowledge of the owner of the premises constitute an unreasonable search or seizure under the Fourth Amendment to the Constitution of the United States?

3. Does the adoption and use of Ringelmann or opacity measurements as standards of permissible emissions violate the due process clause of the Fourteenth Amendment to the Constitution of the United States, and do such standards bear a real and reasonable relation to the end sought to be attained by the Act?

II. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(Those cited by Petitioner's Brief or appearing in Petition for Writ of Certiorari or Brief of Respondent in Opposition to Petition, all of which are adopted herein.) For convenience, Respondent restates the following statutes:

1. Colorado Revised Statutes (C.R.S.) 1963, 66-29-2 (1967 Perm. Supp.), which reads as follows:

   Section 2.—LEGISLATIVE DECLARATION. It is hereby declared to be the policy of the state of Colorado to maintain a reasonable degree of purity of the air resources of the state, which shall be consistent with the public health, welfare, and public enjoyment thereof, the industrial development of the state, the propagation and protection of human, plant, and animal life, and the protection of physical property and other resources. To that end it is the purpose of this act to require the use of all available practical methods to reduce,

prevent and control air pollution in the state of Colorado and to maintain a cooperative program between the state and local units of government. It is further declared that the prevention, abatement and control of air pollution in this state are affected with a public interest and that the provisions of this act are enacted in the exercise of the police powers of this state for the purpose of protecting the health, peace, safety and general welfare of the people of this state.

2. Colorado Revised Statutes (C.R.S.) 1963, 66-29-3 (1967 Perm. Supp.) which reads in part as follows:

   Section 3.—DEFINITIONS.—(1) When used in this act, the following words and phrases shall have the meanings ascribed to them in this section:

   (6) "Air pollution" means the presence in the atmosphere of one or more air contaminants in quantities of characteristics, and of a duration throughout the state or throughout such areas of the state as shall be affected thereby, which are injurious to human, plant, or animal life or to property, or which unreasonably interfere with the comfortable enjoyment thereof.

3. Colorado Revised Statutes (C.R.S.) 1963, 66-29-5, which reads in part as follows:

   Section 5.—EMISSION STANDARDS IN DESIGNATED AREAS OF THE STATE (1) Subject to such variances as may be granted pursuant to section 11 of this act, the emission standards set forth in subsections (2) through (6) of this section shall be in full force and effect in each area of the state designated by the division pursuant to section 8

(1) (c) of this act, immediately upon such designation.

(2) (a) No person shall discharge, or cause or permit to be discharged into the atmosphere, from any single source of emission, any air contaminant for a period aggregating more than three minutes during any hour which is:

(2) (b) As dark or darker in shade as that designated as No. 2 on the Ringelmann chart, as defined in section 3 of this act; or

(2) (c) Of opacity equal to or greater than smoke described in paragraph (b) of this subsection;

4. Colorado Revised Statutes (C.R.S.) 1963, 66-29-8, which reads in part as follows:

(2) (a) In addition to authority specified elsewhere in this act, the division shall have the power to:

(2) (d) Enter and inspect any property, premise, or place for the purpose of investigating either an actual or a suspected source of air pollution or air contamination or ascertaining compliance or noncompliance with any emission standard or any order under this act. Any information relating to secret process, or methods of manufacture, or production obtained in the course of the inspection or investigation shall be kept confidential. If samples of air or air contaminants are taken for analysis, a duplicate of the analytical report shall be furnished promptly to the person who is suspected of causing such air pollution or air contamination.

III. STATEMENT OF THE CASE

This case is concerned with the means employed by the Department of Health of the State of Colorado in securing a Cease and Desist Order against an alfalfa dehydrating plant located in Weld County, Colorado, on the grounds of alleged air pollution resulting from the plant's operation. It was charged that Respondent's emission was of an equivalent opacity greater than that permitted by C.R.S. 1963, 66-29-5 (1967 Perm. Supp.).

The case began with a letter dated June 16, 1969, from the Department of Health, Division of Enforcement, advising Respondent that 12 days earlier, on June 4, 1969, an inspector from the Division had determined that Respondent's emission exceeded the opacity standard of the Colorado Air Pollution Control Act. The letter concluded with a Cease and Desist Order to be complied with in 10 days. Respondent denied the alleged violation and asked for a hearing before the Air Pollution Variance Board.

At the hearing, the inspector who had made the observation in question testified that he was on the premises of Respondent unaccompanied by anyone else and without the knowledge of Respondent's employees. Since Respondent did not know until almost two weeks later that it had been inspected, it could offer no evidence of the opacity of its emission on the day in question, although Respondent did show that its emission was not in violation both before and after the day in question. Since Respondent could offer no evidence to contradict the brief observations of the enforcement official, the Board sustained the issuance of the Cease and Desist Order. On appeal, the District Court of Weld County, Colorado set aside the decision of the Variance Board. That Court held that while the Ringelmann test was not unconstitutional and was a good and sufficient basis to institute proceedings, more precise

tests were available which should have been given careful consideration by the Board.

The Colorado Court of Appeals held that the Ringelmann test was presumptively valid and affirmed the District Court on the basis that the secret nature of the investigation prevented Respondent from having any opportunity to secure probative rebuttal evidence and that therefore the subsequent hearing lacked the necessary fundamental requisites of due process as Respondent could not reasonably conduct a defense. In addition, the Court stated that the on-premise inspection conducted without a warrant or consent, constituted an unreasonable search. The Colorado Supreme Court denied certiorari.

IV. SUMMARY OF ARGUMENT

This case presents not only the question of whether Congress and the States may, consonant with the requirements of the Fourth Amendment, adopt a warrantless inspection procedure directed at air pollution control, but also the question of whether any governmental entity may, consonant with the requirements of the Due Process Clause of the Fourteenth Amendment, adopt an inspection scheme which permits the government to secretly take Ringelmann or opacity readings of a continually dissipating emission. A warrant requirement is only one of a number of means to obviate governmental secrecy. The additional question arises as to whether or not the employment of Ringelmann or opacity measurements as absolute standards of determining whether or not a violation has occurred is a violation of the Due Process clause of the Fourteenth Amendment to the Constitution of the United States.

Respondent's rights of due process were violated by the manner in which the inspection was conducted. Sec-

tion 66-29-8 (2) (d) of the former Colorado Act, authorizing state enforcement personnel to enter and inspect, contained no safeguards such as contemporaneous notice or presentation of credentials which would prohibit a secret inspection. By inspecting in secret, the inspector, to the exclusion of Respondent, seized a mental impression of a continually dissipating emission. Thus the Act, with its lack of any feature which would require the presence of the inspector to be known, permitted action to be taken which affirmatively denied to Respondent any opportunity to introduce probative evidence (the state of the emission at the specific time of the inspection) at the subsequent hearing and operated to deny a real and reasonable opportunity to defend. Due Process in the context of this case requires that Respondent be given the opportunity to view the continually dissipating emission at the time of inspection by being made aware of the inspection.

The hearing itself, while in form non-objectionable, in substance was a mere sham because of the prior statutorily sanctioned governmental stealth. The accused is forced to proceed without any knowledge of the event in question. The opportunity for cross examination is hollow at best since the accused, without knowledge of the state of the emission at the specific time of the inspection, has no point of reference from which to proceed. The making of a charge under these circumstances is equivalent to conviction. The only probative evidence of the challenged emission in existence is in the memory of the inspector, and it is impossible to challenge such evidence when gathered secretly since it continually dissipates.

Only in certain carefully defined classes of cases can investigative entry be deemed reasonable in the absence of consent or a warrant. The requirement of obtaining consent or a warrant prior to inspection is at most a minimal limitation on administrative action. Such a require-

ment cannot be dispensed with in the case of a stationary emission source which is available for inspection so long as it continues to operate. While effective inspection may require surprise, a requirement of obtaining consent or a warrant in no way jeopardizes effective inspection as surprise, a matter of timing, not secrecy, is preserved within the confines of a consent/warrant inspection scheme. The present case is distinguishable from the exceptions to *Camara* in that there is no historical regulation of the alfalfa dehydrating industry, there is no federal licensing involved, and unlike the cases dealing with food, alcohol and firearms, there is no need for immediate, on the spot action. In addition, Colorado amended its law 14 days after the issuance of the Cease and Desist Order to require either the consent of the source or a warrant, and has now operated under this system for nearly five years.

The entry statute involved here is not sufficiently precise to legalize a warrantless search. There are no express limitations on time, scope and manner. These omissions enable the inspector to enter upon Respondent's premises, conduct his inspection and depart, all without the knowledge of any of Respondent's employees.

The "Plain View" doctrine does not apply to the facts of this case, since, under the *Camara* rationale the inspector did not have a right to be in the position on Respondent's premises from which he seized a mental impression of Respondent's emissions. Petitioner's reliance on the "Open Fields" doctrine is untimely, as there are no facts in the record sufficient to sustain that reliance. To the contrary, there is explicit testimony that the inspector was on Respondent's premises and presumably within Respondent's curtilage.

The determination of an emission's lawfulness in terms of statutorily prescribed Ringelmann or opacity standards is unreasonable and wholly arbitrary. The

Ringelmann test measures only blackness; opacity, only visual, as opposed to actual density. Neither bears any correlation to the quantity of contaminant in a given emission. Many factors such as the amount of light, atmospheric haze, humidity, compactness of the emission, and wind affect the visual reading which a particular emission registers. To compound the problems in obtaining a fair reading, the emission in question was composed primarily of steam, a nonpollutant which obscured the alfalfa which escaped from the dehydrating process.

These visual appearance tests selected to enforce the Act bear no real relation to the ends of the Act, which is phrased in terms of eliminating, controlling and abating *quantities* of air contaminants. The blackness or opacity of an emission is not in and of itself related to the quantity of contaminant in the emission, but rather is a function of the compactness of the emission, and is determined essentially by stack diameter. Even if the end of the Act is broadly construed as being for the protection of the public health and welfare, the inapplicability of the means still holds true. If emissions with an opacity of 40 per cent are prohibited as being inconsistent with the public health and welfare, then it is completely irrational to permit an emission which is less than 40 per cent simply because it issues from a larger stack, and therefore has a lower opacity and is not statutorily prohibited, but nonetheless contains a greater quantity of air contaminant. It is the quantities of air contaminants in an emission that affect the public, not the emission's blackness or opacity.

The imposition of sanctions on the basis of Ringelmann or opacity standards is therefore unreasonable in that one source may be held to have violated the law while another source's emissions are not violative, even though the latter contain greater quantities of air contaminants and are more harmful to the public.

V. ARGUMENT

A. The Act, As Applied to Respondent, Permitted Action to Be Taken Which in Effect Denied Respondent a Real and Reasonable Opportunity to Present Evidence and Be Heard at the Hearing, and Operated to Deny a Hearing on the Facts, and Is Therefore Violative of Respondent's Right to Procedural Due Process As Guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Section 8-(2) (d) of the former Act, without requiring prior presentation of credentials or some other type of contemporaneous notice, permitted the secret taking of opacity readings of a continually dissipating emission.

The inspector was on the premises of Respondent unaccompanied by anyone else and without the knowledge of Respondent's employees. This unannounced entry precluded Respondent the opportunity to consent to or deny the entry and also denied the Respondent the opportunity to view the emission at that particular point in time. Expert testimony as to the condition of Respondent's emissions before and after the State's ten minute inspection would not have been competent given the fact that the Act defines a violation in terms of excessive emissions aggregating more than three minutes during any hour. The uncorroborated testimony of the mental impression seized by the inspector was the only evidence of a violation in the hearing which found against the Respondent. The fact that Respondent did not have knowledge of this taking of evidence by the inspector either by consenting to the entry, or being shown a warrant or by notice of the inspection immediately before the opacity reading was

taken, made it impossible to present probative controverting evidence. As a result the substance of the hearing was a mere sham, and the Respondent was precluded from having a real opportunity to present a defense as a direct result of the statutorily sanctioned governmental stealth involved. The physical condition in question was no longer in existence. The secret nature of the investigation resulting in the intangible seizure enabled *only* the government to present probative evidence of the alleged violation, the object of which was effectively destroyed vis-a-vis Respondent by the government because of the stealth involved.

The U. S. Court of Appeals, Second Circuit, in *Escalera* v. *New York City Housing Authority*, 425 F. 2d 853 (1970) cited this Court in *Goldberg* v. *Kelly*, 397 U. S. 254 (1970) in support of its statement that:

> "The minimum procedural safeguards required by due process in each situation, depend on the nature of the governmental function involved and the substance of the private interest which is affected by the governmental action." 425 F. 2d at 861.

The nature of the governmental function involved here is conducting inspections pursuant to and enforcing an act dealing with air pollution, a legitimate governmental concern. Efficient administration of any act is necessary if that act is to be viable. However, such administration cannot be conducted in an expedient manner which disregards the rights of those affected. This is especially true where the substance of the private interest is its very survival. If the Respondent did not comply with the Cease and Desist Order it subjected itself to the possibility of a conviction involving criminal penalties in the same type of proceeding and upon evidence of the same nature

that is in issue here. Respondent submits that its interest in being afforded due process and a fair hearing on balance outweighs the government's interest in prosecuting alleged violations, and that the minimum procedural safeguards adequate to insure constitutionality were absent.

As the Court stated in *Morgan* v. *U. S.*, 304 U. S. 1 (1938):

> "But a 'full hearing' - - - a fair and open hearing - - - requires more than that. The right to a hearing embraces not only the right to present evidence, but also a *reasonable opportunity to know the claims of the opposing party and to meet them.* The right to submit argument implies that opportunity; otherwise, the right might be but a barren one." 304 U. S. at 18 (emphasis added).

In the proceeding in which it found itself after the Cease and Desist Order had been entered, Respondent was denied the fundamental requisites of fairness which are of the essence of due process. Because of the secret nature of the inspection, it had no opportunity whatsoever to meet the claims of the opposing party. This is comparable to the situation in *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 292 (1937). There documents and information which served as the basis of the decision in a rate case were secretly collected and remained undisclosed. The telephone company was given no opportunity to examine, explain or rebut such evidence after it was assembled. The Court stated: ". . . even now we do not know the particular or evidential facts of which the commission took judicial notice. Not only are the facts unknown, there is no way to find them out." 301 U. S. at 302. Here Respondent had no knowledge of the emission in question, since it was prevented from having

such knowledge by the manner in which the inspection was conducted. The emission of its nature came and went and it was impossible for Respondent, who was unaware that the inspection was being made, to ever know the state of the emission at the particular time of the inspection.

This Court in *Greene* v. *McElroy*, 360 U. S. 474 (1959) stated:

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the government's case must be disclosed to the individual so he has an *opportunity to show that it is untrue.* While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty, or who might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice or jealousy." 360 U. S. at 496 (emphasis added).

Respondent submits that in order to provide a reasonable opportunity to show that a charge is untrue a special duty arises on the part of the State where the evidence ceases to exist forever after it has been observed. The State in exercising a right to inspect in such a situation bears the concomitant duty to exercise its right in a fair and reasonable manner.

> "Due process is an elusive concept. Its exact boundaries are indefinable, and its content varies accordingly to specific factual contexts." *Hannah* v. *Larche*, 363 U. S. 420 (1960).

The opportunity to defend necessary to satisfy due process requires, in the context of this case, that Respondent be given the opportunity to view the challenged emission at the time that the inspection is being conducted. In *Escalera* the Court stated that denying a tenant access to the material contained in his folder, considered by the government in the proceeding to evict the tenant, deprived him of due process. The failure to provide the accused of the opportunity to view the tangible evidence upon which the decision will be based not only works against a rational decision as to whether or not to pursue the matter at the hearing level, but forces the party to proceed completely in the dark. Secret inspections in a case such as this deny the accused any opportunity to introduce evidence probative of the particular time upon which the charge is based.[1]

Petitioner contends that due process was provided because the Cease and Desist Order was issued after a year and a half of "conference and conciliation." (Pet. Br. p. 48) The issue is not what happened in this period, but the manner in which the inspection on June 4, 1969 was conducted. Prior unobjectionable treatment does not in any way excuse or outweigh a specific transgression of Respondent's rights.

---

1. Although the inspector did take photographs of the emission in question, they failed to substantiate his observations and therefore the Board did not introduce them at the hearing. Basically they showed no more than a cloud of steam. The Board's failure to introduce these photographs is analogous to the situation where an individual is filmed when he is allegedly intoxicated. The failure of the State to introduce that film, would in many courts result in a dismissal of the charge. If the fact the photographs were not representative of the alleged violation, then the contention cannot be made that the evidence was preserved for Respondent.

It was with great surprise that Respondent received the Cease and Desist Order. During the period of "conference and conciliation" Respondent had cooperated fully with the enforcement personnel. It had installed new equipment and had substantially reduced its emissions.[2] Perhaps it was naive in believing that this cooperation had resulted in compliance as far as the State was concerned and perhaps it should have asked the State to furnish its certified experts to recheck its stacks at the beginning of the 1969 season. Nonetheless Respondent had no reason to believe that a continuous monitoring program was necessary or expected of it. The Amici advance a contention not found in the Appendix, viz., that continual monitoring could be maintained with an electric eye. (Brief of 34 named States p. 18) Respondent can only state that the record likewise is devoid of any testimony concerning the feasibility of such monitoring, either technically or economically. Problems of condensation of moisture on the lens and lens alignment in the stack are unexplained.

Nor could Respondent be expected to have its own employees take continual readings as Petitioner suggests. (Pet. Br. 49) Individuals not affiliated with the state were not certified by the state even though they may

---

2. There were discussions of plant modifications which could be made to improve the emissions then having 40 per cent to 50 per cent opacity. (App. p. 29) Improvements were made. "They have done some work, considerable work in controlling the emissions from all three plants." (App. p. 24) ". . . they probably have done as much or progressed as far along in this field as anyone and I know, or our staff knows of. . . ." (App. p. 24)

The following year, in July of 1968, the plants of Western were again inspected and it was advised in a letter from the enforcement personnel of the Department of Health that "We note with interest that you have made marked progress in the control of dust and smoke emission in the two plants in Weld County." (App. p. 29)

attend the state run "smoke readers" school.[3] Given the fact that certification was arbitrarily denied them, any testimony which they might advance would, a priori, not receive the same weight as that accorded the certified state inspector.

---

3. The administration of the Act by the Variance Board contains another frailty in that as administered, it is impossible for any subject of inspection to present evidence of Ringelmann or equivalent opacity readings which are of a weight equal to that of the inspector's even if such readings were taken simultaneously with the inspector's. This is because, as the record extensively shows, of the manner in which the smoke reading school, conducted at the taxpayers' expense, certified its graduates. Although the enrollment at the school was generally open to anyone who wanted to attend, only state employees were certified as smoke readers upon graduation, even though private individuals might have graduated while compiling a better academic record. This arbitrary denial of certification, which greatly affects the weight of the evidence presented, is fundamentally unfair. It understandably discourages private attendance, and therefore self-enforcement, and is self-defeating.

See App. pp. 47-48; testimony of A. C. Bishard, Air Pollution Control Engineer, State Health Dept.:

> Q. If you pass and if you are sent there by the government you can hand in your paper and they certify you. Right?
> A. That is correct.
> Q. And if you pass and you were not sent by (47) the government, there is no place to hand the papers in. Is there?
> A. If you passed and weren't sent by the government, you are a guest.
> Q. And you don't get any official recognition.
> A. That's right. You are not intended to be certified.
> Q. Is that so as to avoid conflict of expert testimony, as you understand it?
> A. That depends on your interpretation, yes.
> Q. But you pass it one way or another, whether the government certifies you or not.
> A. Yes.
> MR. CAWELTI: That's all.

See App. p. 119, testimony of James R. Taylor, state inspector:

> Q. From your knowledge of the smoke school conducted by the state is there any way a non-publicly employed person can be graduated from or certified by this school?
> A. I think it is the decision of the division that they not be.
> Q. They are not?
> A. Right, sir.

See also App. p. 122.

In addition the burden on the state in providing the opportunity to simultaneously view the emission is minimal compared to the burden of maintaining a constant opacity watch.

The required opportunity to defend in this context is not just subjecting the testimony of the officer or inspector to cross examination, but rather permitting the individual affected by the government's action to have first hand knowledge of the violation. Otherwise a reasonable opportunity to defend is denied. Where the object is continually dissipating this opportunity exists only where the subject of the inspection is made aware that tests are being made.

The opportunity for cross examination of enforcement personnel, where the source has no knowledge of the state of its emission at the specific time in question, is hollow at best. Substantively the defense would have no reference on which to base its questions, and no way of knowing whether the inspector was mistaken or not. An elementary principle of cross examination is never ask a question to which the answer is unknown, but here the accused has no independent knowledge of its own as to the true state of facts.

When secret inspections are authorized, the mere making of a charge is tantamount to conviction. No probative evidence other than the testimony of the inspector who made the charge is necessary, and where that evidence is gathered in secret, it is impossible to challenge. Through the course of these proceedings, Respondent has tried to show that by inspecting in secret the state actually has denied this Respondent the opportunity to defend. It can produce no probative evidence of its own and is limited to the charade of cross examining the charge maker. The mere statement of the charge (40% opacity)

is proof of its guilt. The board can have no evidence before it to make a decision other than the testimony of the charge maker. By requiring notice of an inspection and the opportunity to be present, it is clear that the government's goals can still be accomplished while at the same time the accused is assured of a hearing in which he has the opportunity to have firsthand knowledge of the basis of the charge.

Contrary to Petitioner's expressed fears, the decision of the Colorado Court of Appeals does not require every regulatory agency to afford industry the opportunity to have an observer on hand whenever tests are made which may be used as evidence in administrative proceedings. The decision involves particular facts presented in this case of drying alfalfa and the emissions unique to that process and holds only that such an opportunity must be afforded where the evidence is continually dissipating and where lack of notice would thereby deprive the subject of the inspection an opportunity to adequately defend itself.

Petitioner and Amici erroneously apply *Capler* v. *City of Greenville*, 298 F. Supp. 295 (N.D. Miss. 1969), to the facts of this case. Capler, the accused, was an individual with a memory and possessed first hand knowledge of his evanescent condition. It is impossible for Respondent to have first hand knowledge of anything except through its employees. Public drunkenness, a common and well recognized condition, was observed by three officers. Here only one inspector viewed a condition which is difficult to interpret and involves a large degree of judgment, even with the proper training. The proper training was absent here as the school did not have the capacity to create emissions composed primarily of steam (see footnote 9, infra). In *Capler* the failure of the city to make a test for intoxica-

tion did not in any way deny Capler the opportunity to introduce probative evidence of his condition.

To merely require an informal opportunity providing notice immediately prior to the inspection would not in any way undermine the inspection's effectiveness and would insure that minimum of fairness lacking in the present case, where, because of the wind-blown, steam-mixed nature of the emission, the source has no knowledge of the opacity of its emission during the specific time of the inspection.

The valid state and federal interests in the air pollution area can be achieved within the confines of a statutorily authorized inspection scheme limited to eliminate the abuses inherent in secret inspections. Secrecy is not necessary to an effective inspection program. The Petitioner equates secrecy with surprise. The presentation of credentials or other identification does not eliminate surprise, which is a matter of timing, not stealth. Surprise is preserved where the inspector appears unexpectedly and unannounced and presents his credentials. That this is not an emergency situation is evident from the lengthy conciliation process engaged in by the parties before the Cease and Desist Order was issued. Section 66-29-9 of the Act, "Temporary Orders Prohibiting Air Pollution of Immediate Danger to Public Health", specifically provides the State with an adequate remedy in an emergency situation. It was not employed against Respondent. The State's opting for the non-emergency procedure accurately characterizes the nature of the situation.

Petitioner plays with credulity when it states "expensive collection equipment" could be switched on to frustrate inspections if a forewarning were given. (Pet. Br. 41) There was no such equipment involved here. Moreover, it is absurd to believe that if an expensive

capital expenditure had been made for abatement equipment, that such equipment would not be in operation. As the Appendix clearly demonstrates, no feasible collection equipment was in existence for Respondent's industry.[4]

If mere notice, less burdensome than a warrant requirement, would frustrate effective inspection as Petitioner contends, it remains a mystery why Colorado amended its law fourteen days after the Cease and Desist Order was entered against Respondent to require consent or a warrant. This is a legislative declaration that neither surprise nor secrecy are needed for inspections to act as a credible deterrent to

---

4. See Appendix, p. 62, where Mr. Carrol Syverson, Executive Vice President of Respondent, elaborates on this point:

MR. FOSTER: Some of the previous testimony given on behalf of the Department mentioned taking the effluent now being discharged, putting it through water. Would not that be additional control that would be feasible to eliminate practically all of the emissions from the plant?
A. I presume that it would be possible, yes, which is a method of scrubbing, I think it's preferred to. It would be, in our opinion, beyond the limits of economic feasibility for this type of installation.
Q. Costwise?
A. Capital cost, yes, and the engineering, all things considered plus the operational cost. So then you immediately create another pollution problem.
MR. CHENAULT: Any reason why a bag type collector could not be used as a collection media as opposed to a scrubber system?
A. For a good reason, and that is we have in the past, the industry, our company we used this extensively with extreme difficulty which the main reason is loss by fire. Fire is ever present here, an ever present condition. Bag type collector means not only the loss of that unit, but perhaps your buildings with it.
MR. CHENAULT: If you had a bag house after (68) the cyclone would you still be confronted with this? It seems to me your cyclone is your source.
A. We are talking about a closed system here, really. You got circulating systems of air here going through and fire can be carried from one end to the other, through the whole works. One would have to look at the flow chart to be able to see this.

See also *Pennsylvania* v. *Pennsylvania Power*, 6 E.R.C. 1328 (1974).

pollution. Petitioner has now operated under this law for nearly five years. Surely Colorado would not enact a statute that would frustrate its own inspection system, and certainly such a statute would have been repealed some time in the last five years if the breakdown in enforcement postulated by Petitioner had resulted.

Petitioner also emphasizes the need for quick action because the emission is continually dissipating. While an emission exceeding the prescribed standard for three minutes constitutes a violation, it is clear that such a time period is used only as a minimum measure of the inspection length necessary to institute conciliation proceedings which work toward the abatement of the long term effect of air pollution. Three minutes is not a magic number. A Cease and Desist Order can be based on an emission of longer length. The stationary source will remain where it is and will be available for inspection. The flexibility required for quick action is not hampered at all by requiring contemporaneous notice. No delay would result as opacity readings such as afforded the basis of the charge here, are made without aid of any equipment. Immediately upon presentation of his credentials the inspector could step outside and commence inspecting. No action could conceivably be taken within that time which would frustrate inspection. Furthermore, Petitioner's argument in this vein, in the context of an inspector stumbling upon a violation (Pet. Br. 42) ignores that inspections are conducted in a preplanned, methodical and routine fashion. It should be plain to anyone that the inspector here did not just happen to drive by three of Respondent's plants on June 4, 1969.

The amici curiae, in urging this Court to grant certiorari stated:

"What holds for the federal government should also hold for the states, especially in the field of air pollution controls. . . ." p. 14, Amicus Curiae in Support of Petition for Writ of Certiorari.

Respondent can do no more than to point out that the Clean Air Act, 42 U.S.C., Section 1857c-9 quoted by the amici, in providing for entry "to, upon or through any premises in which an emissions source is located", authorizes such entry by an inspector only "upon presentation of his credentials". (Pet. Br. 37). As opopsed to the former Colorado Act, Respondent would affirmatively support this type of statutory inspection scheme. The presentation of credentials mandated in the Clean Air Act insures that secret inspections do not take place and provides the necessary safeguards that are glaringly absent from the former Colorado Act.

It cannot be seriously contended that the presentation of credentials would frustrate inspections. Such a requirement, in lieu of the consent/warrant scheme, would pose even less of a burden.

The Amici advance three reasons in support of the need of frequent, unannounced inspections if violators are to be deterred. (Br. of 34 Amici, p. 17) None of the bases of these reasons is undermined by requiring notice. Like Petitioner, they confuse secrecy with surprise and likewise fail to perceive that surprise is a matter of timing, not stealth, and is preserved in a contemporaneous notice framework. A contemporaneous notice requirement (e.g. presentation of credentials) does not in any way impair surprise, flexibility or randomness. The Amici speak of the need for conducting inspections "at a moment's notice" (Brief of 34 Amici, p. 17) and that is all that Respondent is contending is needed to satisfy due process in the context of this case.

Respondent does not contend that it must be given advance notice of an inspection. Contemporaneous notice as found in the Clean Air Act would however permit Respondent and others in its position to observe simultaneously with the inspector or immediately thereafter. The methods of observation employed require no involved equipment or time in preparing for the observation, leaving unfounded any fears that any type of notice would provide time for the subject of the inspection to correct any violations which might exist. Such a request does not seem particularly burdensome or at all unreasonable when the end result is to put Respondent in the position where another secret inspection and sham hearing would subject it to a criminal conviction pursuant to § 66-29-15 of the former Act.

It must be emphasized that while imposition of the *Camara* rules does insure fairness, as the subject of the inspection will then be aware of the inspection if its consent is sought or if a warrant is presented, a finding of the inapplicability of *Camara* would not in any way alleviate the necessity of informing the subject of the inspection that an inspection is being made. Such a notice requirement, unconcerned with consent or warrants, is found either expressly or impliedly in many air pollution statutes other than the Clean Air Act.

If proper yet nonetheless surprise preserving notice is given at the investigatory level, the inspected parties will not be left with the impression that they have been secretly raided by government agents. The giving of proper notice would tend to foster an atmosphere of cooperation and conciliation between the parties conducive to the attainment of the ends of the Act. The odiousness of governmental secrecy was perhaps best summed up by Justice Frankfurter in *Joint Anti-Fascist Refugee Committee* v.

McGrath, 341 U. S. 123 (1951) when he said in a concurring opinion:

> "The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy: a democratic government must therefore practice fairness, and fairness can rarely be obtained by secret, one sided determination of facts decisive of rights." 341 U. S. at 170.

Secrecy and fairness in the general sense stand at odds. In the context of this case they are especially inapposite as secrecy denies the opportunity to present probative evidence and thus denies a real and reasonable opportunity to defend.

B. The Taking of Opacity Readings on the Premises of Respondent, a Stationary Emission Source, Without Either a Search Warrant or the Consent or Knowledge of Anyone Representing the Respondent, Constituted an Unreasonable Seizure under the Fourth Amendment to the Constitution of the United States.

1. Preliminary Comment

Beginning at page 13 of its brief, Petitioner develops an argument entitled "This Case Does Not Fall Within the Purview of the Fourth Amendment." However, through the full thirteen pages there is no mention of one fact in this case. It is, rather, an attack on *Camara* v. *Municipal Court*, 387 U. S. 523 (1967) and a discussion of the cases decided subsequently involving the applicability of the Fourth Amendment to administrative inspections. The attack on *Camara* is premised on what Petitioner terms as an unwarranted departure from certain revered principles of "Anglo-American" constitutional law. Given the

fact that there is no "Anglo-American" constitutional law, Respondent submits that Petitioner's view of the situation is somewhat confused.

While Petitioner states that Respondent did not complain about the propriety of the secret entry and inspection now subject to the Fourth Amendment debate in this case (Pet. Br. 29), it is clear from the Appendix and the briefs of Respondent both in the trial court and before the Colorado Court of Appeals, that the propriety of the entry was strenuously objected to in terms of its effect on Respondent's procedural due process rights. As the record reflects, Respondent developed its case from this standpoint, and consequently the record was devoid of anything regarding the nature of Respondent's premise and its relation to the Fourth Amendment. That point first appeared in the decision of the Colorado Court of Appeals.

As there was no record developed with regard to a Fourth Amendment argument, the Court of Appeals operated in something of a void as to the complete and total facts which would serve as a basis for a Fourth Amendment analysis. Facing this situation as best it could, and given the fact that the record was not as well developed as it might have been the Court nonetheless analyzed the rationale of this Court in *Camara* and applied that rationale to the facts of this case. The Court, with its concern for fundamental fairness, applied the Fourth Amendment as best it could on the basis of the record before it. Respondent does not argue that the Fourth Amendment applies without exception to every governmental inspection, but does submit that the protections inherent in that amendment now do, and in the future should, continue to apply in those administrative inspection cases where such protection is necessary. It is a difficult and lengthy process

to draw the line separating those cases which require Fourth Amendment protection for those which do not, but nonetheless such a line must be drawn in order to preserve those freedoms which are necessary to a free and open society.

2. The Taking of on Premise Opacity Readings Is Governed by the Decisions in *Camara* and *See* and Does Not Fall Within the Carefully Defined Exceptions to Those Decisions.

Seven years ago this Court, in *Camara*, dealing with administrative searches by municipal health and safety inspectors, held:

> "In summary, we hold that administrative searches of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual, and that the reasons put forth in *Frank* v. *State of Maryland* and in other cases for upholding these warrantless searches are insufficient to justify so substantial a weakening of the Fourth Amendment's protections." 387 U. S. at 534.

On the same day this Court, in *See* v. *City of Seattle*, 387 U. S. 541 (1967), dealing with administrative searches by municipal fire inspectors, extended the holding of *Camara* when it stated:

> "It is these rather minimal limitations on administrative action which we think are constitutionally required in the case of investigative entry upon commercial establishments." 387 U. S. at 545.

Justice White for the majority held:

> "We therefore conclude that administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure." 387 U. S. at 545.

In spite of specific statutory authority, the warrantless searches attempted in *Camara* and *See* were proscribed by this Court as being contrary to the basic purpose of the Fourth Amendment. The basic purpose "is to safeguard the privacy and security of individuals against arbitrary invasion by governmental officials" and the amendment which embodies it "thus gives concrete expression to a right of the people which is basic to a free society." 387 U. S. at 528.

The *Camara* majority enunciated the purposes behind the Fourth Amendment's warrant requirement, which purposes, this Court stated, superseded the arguments that the inspection statute made the least possible demand on the individual occupant, was hedged with safeguards, and that the warrant process could not in reality function effectively as it would be a mere rubber stamp. The purposes as set forth in *Camara* are to afford protection from the following abuses of unauthorized entries:

> When the inspector demands entry, the occupant has
>
> (1) no way of knowing whether enforcement of the statute involves inspection of the premises;
>
> (2) no way of knowing the lawful limits of the inspector's power to search; and,
>
> (3) no way of knowing whether the inspector himself is acting under proper authorization.

As the Court pointed out, "the practical effect of this system is to leave the occupants to the discretion of the official in the field. This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search." 387 U. S. at 532. As the Court stated in *See*, "The businessman, like the occupant of a residence has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by warrant." 387 U. S. at 543.

The statute in question, Colorado Revised Statutes, 1963, §66-29-8 (1967 Perm. Cum. Supp.), authorizes administrative entry in the following manner:

> (2) (d) enter and inspect any property, premise or place for the purpose of investigating either an actual or a suspected source of air pollution or air contamination or ascertaining compliance or non-compliance within any emission standard or any order under this article. Any information relating to secret process, or methods of manufacture, or production obtained in the course of inspection or investigation shall be kept confidential. If samples of air or air contaminants are taken for analysis, a duplicate of the analytical report shall be furnished promptly to the person who is suspected of causing such air pollution or air contamination.

This statute is totally devoid of any limitation or restraint as to time or place as found in, for example, the valid statute in *United States* v. *Biswell*, 406 U. S. 311

(1972), and leaves enforcement entirely to the whim and caprice of the administrative official. A comparison with the municipal ordinance involved in *Camara* is in point. That statute reads as follows:

> "Section 503—RIGHT TO ENTER BUILDING. Authorized employees of the city departments or city agencies, so far as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure or premises in the city to perform any duty imposed upon them by the municipal code." 387 U. S. at 526.

Although no "cause" requirement is found in this municipal ordinance, it does impress several safeguards on the exercise of discretion of the administrative official in that they shall present "proper credentials" and enter only at "reasonable times". The Court also noted in footnote 10 that the administrative official could not obtain entry by force at least where there is no emergency. Footnote 1 also mentioned that apartment house owners paid an annual license fee in part to defray the cost of periodic inspections of their buildings. In this respect the apartment owner's reasonable expectation of privacy was minimal, as opposed to that of alfalfa dehydrators who pay no such similar fee. If the facts in *Camara* required the utilization of the warrant machinery, then Respondent, faced with a statute having none of the restraints and safeguards found in the *Camara* ordinance, should properly be found to be entitled to the same protection afforded in *Camara* and as applied to commercial establishments in *See*.

The most important safeguard in the *Camara* statute is the requirement that the inspector present his creden-

tials, although even this safeguard did not prevent the imposition of the consent/warrant requirement, perhaps because the case dealt with residential rather than business premises. This presentation requirement is not found in §66-29-8, and because of its absence the inspection on June 4, 1969, involved in this case was carried out without the knowledge of anyone representing Respondent. Secrecy, so conducive to arbitrary governmental action, is abhorrent to a free and open society, and Respondent submits that such a safeguard, as found even in the cases where the consent/warrant requirement is not imposed, is constitutionally required on the facts of this case.

Camara and *See* dealt only with factual situations wherein the administrative official identified himself, asked for permission to enter and search, and was refused. The administrative official here never identified himself or made any attempt to inform anyone that pursuant to statutory authority, he was conducting an inspection.

Certainly this case stands as an actual example of the abuses mentioned in *Camara* which can occur as a result of the unfettered exercise of discretion invested in such an administrative official. Not only did Respondent have no way of knowing (1) whether enforcement involved inspection, (2) the lawful limits of the inspector's power of search and, (3) whether the inspector was acting under proper authorization, but because of the secret nature of the inspection had no opportunity to ascertain any of the three factors mentioned above. The inspection proceeded with the inspector entering Respondent's premises. The record shows that Respondent operated a dehydrating plant on the premises. The public was neither invited nor expected to be on the premises as would be the case with a retail establishment. Such secret, warrantless inspec-

tions, if permitted, hold forth the potential for further and graver abuse.

Appellant cites *United States* v. *Biswell*, 406 U. S. 311 (1972), as authorizing the warrantless inspection involved in this case. This construction is improper for a number of reasons.

First, this Court in *See* qualified its holding to exclude cases like *Biswell* when it stated "nor do we question such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product." 387 U. S. at 546. As the Court stated in *Colonnade Catering Corporation* v. *United States*, 397 U. S. 72 (1970):

> "In *See*, we reserved decisions on the problems of 'licensing programs' requiring inspection, saying that they can be resolved 'on a case by case basis under the Fourteenth Amendment standard of reasonableness'." 397 U. S. at 77.

In *Colonnade* the Court considered for the first time the question of the application of the Fourth Amendment doctrines enunciated in *Camara* and *See* to a system that involved federal statutory authorization for entry. A reading of the case indicates that under the particular facts and circumstances of that case, a warrantless search and seizure, if carried out without force, would not violate the command of the Fourth Amendment. Two years after *Colonnade* and five years after *Camara* and *See*, the Court again faced a situation similar to *Colonnade* in *Biswell*. There it was held that the warrantless search of a gun dealer's locked storeroom during business hours as part of an inspection scheme authorized by the Gun Control Act of 1968 during which the seizure of unlicensed fire-

arms was made, did not violate the Fourth Amendment. Again, federal statutory entry authority was involved. As *See* made clear, *Colonnade* and *Biswell*, because they involved federal licensing, fall outside the purview of *Camara* and *See*.

Biswell and *Colonnade* exemplify the carefully defined classes of cases which are exceptions to the general rule enunciated in *Camara* that a search without proper consent is unreasonable unless a warrant is obtained. Petitioners' interpretation of the Court's intent in *Camara* and *See* as limiting the scope of those cases "only to very limited situations" (Pet. Br. 16) misinterprets their clear thrust.

Second, assuming arguendo that the construction of the Fourth Amendment found in *Colonnade* and *Biswell* has some bearing on this case it is submitted that they are distinguishable to such a degree that their applicability is unwarranted. *Colonnade* involved a federally licensed dealer in alcoholic beverages. Federal agents from the Alcohol and Tobacco Tax Division of the Internal Revenue Service identified themselves to the manager and asked his consent to open a locked liquor storeroom. Colonnade's president refused to open the storeroom, and the agents ignored this refusal, breaking the lock on the storeroom door, entering, and seizing bottles which they suspected were being refilled contrary to federal law. Emphasizing that a federal license was required to engage in the business and that Congress had historically exercised close control over the liquor industry, the Court concluded that Congress had ample power "to design such powers of inspection under the liquor laws as it deems necessary to meet the evils at hand". 397 U. S. at 76. This power of Congress extended to broad authority to fashion standards of reasonableness for searches and seizures. However, and

parenthetically, under the existing statutes, Congress had selected a standard that did not include forcible entries without a warrant and therefore found in favor of petitioner Colonnade. The Congress did not fail "to make rules governing inspection procedure" (Pet. Br. p. 22) which therefore permitted the Fourth Amendment to apply. It applies regardless of whether or not a statutory inspection scheme is provided. If adequate safeguards are provided in the statute, it may then supplant the Fourth Amendment warrant requirement, but the Amendment does apply to determine whether the statute is sufficiently precise to permit the supplementation.

In *Biswell* a federal treasury agent identified himself and requested entry into a locked gun storeroom. Respondent, a gun dealer, initially refused entry but, when given a copy of the federal statutory authority authorizing entry, permitted the warrantless inspection. The Court sums up this interchange as follows:

> "When the officers asked to inspect the respondent's locked storeroom, they were merely asserting their statutory right, and respondent was on notice as to their identity and the legal basis for their action." 406 U. S. at 314.

Given the fact that the agent identified himself and provided the dealer with a copy of the applicable statute which authorized entry and enumerated the lawful limits of the inspector's power to search in terms of scope as well as time, the potential abuses found in *Camara* were, to a large extent, obviated. This was not the situation in the present case where petitioner's agent entered respondent's premises, obtained the evidence he sought, and vanished without a word to anyone.

Petitioner states that *Biswell* gives broad approval to statutory authorization. (Pet. Br. p. 22) It must be emphasized that this "broad approval" is only within the context of the carefully defined exceptions to *Camara* and *See*.

It is also worth mentioning that the Court qualified this approval by stating that in the particular context of *Biswell* where there is a regulatory inspection system of business premises, which system is carefully limited in time, place and scope, the legality of the search depends upon the authority of a valid statute and not on consent. By actually notifying the gun dealer of their presence, and by providing him with a copy of their statutory authorization, which was limited in time, place and scope, the agents, even if they had not obtained the respondent's consent, did put the respondent on notice as to their identity and the legal basis for their action, thus quelling the abuses potentially inherent in a warrantless search which abuses become a reality in the case where the entry and seizure is made unannounced, as it was done here.

In line with the reasoning contained in *Colonnade*, the Court then went on to further justify the warrantless search. As in *Colonnade*, the dealer was federally licensed. While noting that federal involvement in the regulation of interstate traffic in firearms did not have quite the historical basis as did governmental control of the liquor industry, the Court noted that there was an urgent federal interest in preventing violent crime which at least over the past few decades has been rapidly expanding.

Subsequent federal district court cases have also upheld warrantless searches authorized by federal statutes. *United States* v. *Del Campo Baking Manufacturing Company*, 345 F. Supp. 1371 (D. Del. 1972) and *United States*

v. *Litvin*, 353 F. Supp. 1333 (D. D.C. 1973). Both of these cases involved Food and Drug Administration inspectors acting under the Federal Food, Drug and Cosmetic Act. The Court in *Del Campo* held that the *Biswell* decision dealing with a federally licensed gun dealer was based not only on that fact but on the fact that like *Colonnade*, the business was one that was pervasively regulated. Here we are not dealing with a federal regulatory inspection scheme nor with a pervasively regulated or federally licensed business. By their very nature, pervasively regulated businesses are so regulated because it has been legislatively deemed necessary, due to the nature of the business and the goods or instrumentalities with which they deal. Their special natures in part support the decisions which uphold the warrantless but not secret inspections found there which are necessary to insure effective regulation.

The fact that the business is federally licensed and pervasively regulated has a great bearing in determining whether or not that business had a reasonable expectation of privacy protected by the Fourth Amendment. For example, the Gun Control Act which authorized warrantless inspection in *Biswell* posed only limited threats to the gun dealers' expectations of privacy. As the Court stated:

> "When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms and ammunition will be subject to effective inspection. Each licensee is annually furnished with a revised compilation of ordinances that describe his obligations and define the inspectors' authority. . . . The dealer is not left to wonder about the purposes of the inspector or the limits of his task." 406 U. S. at 316.

There is no federal licensing or pervasive regulation of the alfalfa dehydrating business. Compared to *Biswell* and similar cases, Respondent in this context has a very high expectation of privacy in terms of entrance onto its property. Surely secret entries of this nature constitute the abuse of discretion which is circumscribed by the tenets of the Fourth Amendment.

The Court in *Biswell* distinguished *See* in an additional respect. Effective inspection in *Biswell*, it was stated, unlike *See*, required warrantless inspections and such inspections, under the circumstances, must be deemed reasonable official conduct under the Fourth Amendment. The Court stated:

> "We do not decide whether warrants to inspect business premises may be issued only after access is refused; since surprise may often be a crucial aspect of routine inspections of business establishments. The reasonableness of warrants issued in advance of inspection will necessarily vary with the nature of the regulation involved. . ." 387 U. S. at 545, footnote 6.

The other cases cited by Petitioner upholding warrantless inspections were also premised upon the same principle. The exigencies of the particular situations are, and should be, largely controlling. For example, the Court in *Del Campo* cited with approval a passage in the *Biswell* decision which stated:

> "Here, if inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspections; and if the necessary flexibility at the time, scope and frequency is to be preserved, the protections afforded by a warrant should be negligible." 406 U. S. at 316.

Del Campo, involving adulterated food consisting in part of whole insects and insect fragments prepared under unsanitary conditions, delved into the legislative history of the Food, Drug & Cosmetic Act. The Court stated, that frequent, unannounced warrantless inspections were vitally needed for public protection, primarily as the "Dangers to life and health and such obvious frauds as palming off horse meat for hamburger" could be expected to ensue immediately in the absence of effective inspection." 345 F. Supp. at 1376, footnote 12.

Litvin, involving food which had been exposed to and contained rodent excretia and hairs, restated the "extreme importance" of effective inspection to the public health. They stated that this fact, coupled with the pervasive federal regulation found within the food industry placed the defendants' business on an even keel with the liquor dealers of *Colonnade* and the firearms dealer in *Biswell*. The Courts in *Del Campo* and *Litvin* were dealing with a situation which, by its very nature, demands harsh inspection lest tens or hundreds of people almost immediately suffer death or serious illness. The immediacy of the need for inspection is apparent in a situation such as this and in a situation like *Biswell*, where the objects of the search could be easily removed and hidden.

This immediacy, present in all cases cited by Petitioner, distinguishes those cases from the factual situation now before the Court. Cases involving food, firearms and liquor fall then within what the *Camara* Court called "those carefully defined classes of cases" where warrantless searches are permissible. An analysis of the types of searches involved in these cases clearly demonstrates that the nature of the search made in the present case is such that it does not fall within the scope of the food, firearms and liquor cases. In those cases and in others

cited by Petitioner (see, e.g. *Youghiogheny and Ohio Coal Co.* v. *Morton*, 364 F. Supp. 45 (S.D. Ohio 1973) the inspectors in the course of their inspections are likely to discover some prohibited articles which by their very nature require immediate seizure and which could not have been identified prior to the inspection, or conditions which if not inspected present the spectre of sudden human death and disaster (i.e. botulism, mine cave-ins). This is not at all the situation here.

As discussed extensively in Argument A, state and federal interests in the air pollution area can be and currently are achieved within the confines of a warrant/consent system. Even though surprise in such an inspection scheme is preserved if a warrant is obtained beforehand, there is little need for surprise, given the fact that observations can be made at any time the plant is operating. Indeed, Colorado has used the consent/warrant scheme for five years. If frustration had resulted, presumably the current Act would have been modified.

The Court in *See* stated: "The mission of the inspection system was to discover and correct violations of the building code, conditions which were relatively difficult to conceal or to correct in a short time. Periodic inspections sufficed and inspection warrants could be required and privacy given a measure of protection with little or any threat to the effectiveness of the inspection system at issue." 406 U. S. at 316. Here as long as the plant continues to operate the state may take its readings, and periodic inspections do suffice.

The statute in question was not upheld, as Petitioner contends (Pet. Br. 38), by the Colorado Supreme Court in *Lloyd A. Fry Roofing Co.* v. *The State of Colorado Department of Health*, 499 P. 2d 1176 (1972). Rather the

law now in effect was considered, as the Court abundantly made clear. (499 P. 2d at 1178) Furthermore, the entry section of the new law is totally different in that secret inspections are obviated by the requirement of obtaining a warrant or consent. The other arguments advanced in this brief regarding the Act's constitutionality were not made in *Fry*.

Petitioner also cited *United States* v. *Business Builders, Inc.*, 354 F. Supp. 141 (N.D. Okla. 1973) in support of its contention that a valid statute authorizing inspection supplants the need for a warrant. (Pet. Br. 40) This case, like *Del Campo* and *Litvin* involved the seizure of contaminated food. In all cases cited by Petitioner as examples of statutes permitting warrantless inspections, the inspectors identified themselves. None of the inspections were secret. Granted, consent is immaterial if a valid statute is in force, but the Colorado statute was not sufficiently precise to legalize warrantless inspections. Time, place and scope are not the only limitations which must appear in a valid statute. As *Business Builders* pointed out, the method or manner in which the inspection is conducted is a necessary limitation on the arbitrary exercise of governmental discretion. 354 F. Supp. at 143.

The record clearly shows that the inspection was conducted without the knowledge or consent of the Respondent, but Petitioner attempts to weave an argument of implied consent. As mentioned at p. 25, supra, Respondent interposed strenuous objection to the secret inspection at all stages of this case, in Fourteenth, not Fourth Amendment terms. Because of its secret nature Respondent never had the opportunity to actually consent or object to the inspection, which is why Petitioner can make the misleading statement there is nothing in the record to show Respondent had not consented or objected to the

inspection. (Pet. Br. 29) Petitioner's reliance on *United States* v. *Duffy*, 282 F. Supp. 77 (S.D. N.Y. 1968) is misplaced and its reasoning convoluted. In *Duffy*, like *Biswell* a liquor case, the inspectors identified themselves. As Duffy did not unequivocally refuse access, it was held that he consented to the inspection made without stealth. This is to be distinguished from the present case where the inspection was secret and as a result, Respondent was given no opportunity to deny. To ascribe to total silence, the attributes of a nonvolitional consent is unwarranted where the inspector did not identify himself and where no opportunity to manifest any type of consent or denial was present.

Petitioner's discussion of the "consent issue" (Pet. Br. pp. 20-21) as discussed in *United States* v. *Thriftimart, Inc.*, 429 F. 2d 1006 (9th Cir. 1970), cert. den. 400 U. S. 926 (1971) omits any mention of the most important fact in that case. "Here the managers were asked for permission to inspect." 429 P. 2d at 1010. The inspection was not conducted in secret and without knowledge of the inspectee. If the evidence in *Thriftimart* was continually dissipating, the situation confronting the Court in this case would not have arisen. This was a Food, Drug and Cosmetic Act case where surprise is crucial and that need is met even though secret inspections are not permitted under the governing statute.

3. The "Plain View" and "Open Fields" Doctrines Do Not Apply to Opacity Readings Taken on Respondent's Premises.

The "Plain View" doctrine holds that objects falling in plain view of an official who has a right to be in a position to have that view are not protected by the Fourth Amendment. Petitioner ignores the fact that before the

doctrine applies, the official must have a right to be in the position to have the view. *Harris* v. *U. S.*, 390 U. S. 234 (1968). For example, an officer making a lawful arrest has the right to be in the position to have the view whereby he sees something illegal. *U. S.* v. *Vilhotti*, 452 F. 2d 1186 (2d Cir. 1971). Again in *United States* v. *Capps*, 435 F. 2d 637 (9th Cir. 1970), the Court applied the plain view doctrine, in holding that a search and seizure was legal and in permitting the seized items to be introduced into evidence. In that case, the police had a right to be in a position to observe the item in plain view which was seized. The *Camara* rationale, applicable to this case, holds that the inspector did not have the right to be on Respondent's premises from which position he made his observation and therefore any argument that the plain view doctrine applies in this case must necessarily fail.

Petitioner correctly points out that observations made from an "open field" are not entitled to the protections of the Fourth Amendment. The Court in *Capps* described the open fields doctrine when it stated,

> "The Fourth Amendment protections do not extend to the 'open field' area surrounding a dwelling and the immediately adjacent curtilage. . ." 425 F. 2d at 640.

The problem with the application of that doctrine to this case is the fact that the inspector himself testified that he was on the *premises* of respondent at the time he made his observations. He did not testify that he was in any open field adjoining respondent's building and the immediately adjacent curtilage. It is certainly fair to assume that if the inspector was on the premises of respondent he was within the curtilage given the fact that the area on which he stood was immediately adjacent to the plant. *Fullbright* v. *United States*, 392 F. 2d 432 (10th Cir.

1968). Petitioner is late in relying upon this doctrine when it has failed to show facts in the record sufficient to apply it. In contrast to this gap in the record is the explicit testimony that the inspection was made on the premises of respondent. This is not the situation as in *Fullbright* where investigators stationed themselves outside the curtilage and carried on their investigation with the aid of binoculars. Nor is this the situation in *McDowell* v. *United States,* 383 F. 2d 599 (8th Cir. 1967) where the defendant attempted to construe fields 1/4 to 1/2 mile away from the farm buildings as curtilage. Unless arbitrary assumptions are made unsupported by the record, there can be no application of the open field doctrine to the actions of and evidence gathered by the inspector here.

Petitioner cites *Katz* v. *U. S.*, 389 U. S. 347 (1967) for the proposition that what a person knowingly exposes to the public is not subject to Fourth Amendment protection. The situation in *Katz* was concerned with a phone conversation made from a public phone booth and the Court there held that even though the conversation was made in what might be considered a public place, it was constitutionally protected from warrantless search and seizure by the government officials. As to inspections made on private premises, it would still appear to be the rule that the official in question must have proper authority for being on the premises before he may testify as to the fruits of his search. This point was discussed supra when the plain view doctrine was considered. This Court has always been concerned with meddlesome officials prying about on one's private premises. Suppose that while walking on the premises, this official observed a stand of marijuana. Could it be seriously contended that he could snatch a stalk of that growth and take it into

Court without having obtained a warrant to do so? Respondent submits that there exists a reasonable expectation of privacy from all warrantless and undisclosed official inspections which reasonable expectation is protected by the Fourth Amendment.

C. The Former Air Pollution Control Act in and of Itself and As Applied to the Respondent in This Action Is Unconstitutional in That It Works in Such a Manner As to Deprive the Respondent of Its Property in Contravention of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

1. The Tests Employed in the Former Act for Determining Whether the Maximum Permissible Discharges for Air Contaminants Have Been Exceeded Are Arbitrary, Capricious and Unreasonable and Are So Subjective As to Offend Traditional Notions of Fair Play and Substantial Justice.

Respondent was not in a position to initially shape the questions presented for review in this proceeding and under the provisions of Supreme Court Rule 40 realizes that it is limited in presenting additional questions. However, a question upon which evidence was received in the lower courts and which was fully briefed and argued by the parties is that concerned with the constitutional adequacy of the visual determination standards which were used as the sole basis for ascertaining violations and applying criminal sanctions. Respondent submits that the Court may notice the plain error of Petitioner in failing to raise this issue for consideration and hear the parties at this time.

In October, 1973, a United States Court of Appeals in *Portland Cement Association* v. *Ruckelshaus*, 486 F. 2d 375

(D.C. Cir. 1973) involving the action of the administrator of the Environmental Protection Agency in promulgating stationary source standards, recognized the arbitrariness of opacity standards:

> "It may be, as EPA argues that the opacity test is an important enforcement tool, and that the results of an opacity test, which is normally performed at some distance from the plant by trained observers, offers a cheaper and faster method of determining compliance than enforcement of the particulate concentration standard. *However, it is one thing to use a method of testing to observe possible violations of a standard; it is another to constitute that method as the standard itself.* If the opacity test is to be a standard, and if violations can result in enforcement actions without further testing, the standard must be consistent with the statute and congressional intent.
>
> The thrust of the manufacturers' comments to EPA, and repeated here, is that the opacity test is arbitrary—that inspectors will be unable within any reasonable degree of accuracy to determine whether permitted opacity is 10%.
>
> The critical question is how accurate can opacity observations be. On this point we essentially have before us only the contentions of the parties. The manufacturers do point to a test conducted for the National Center for Air Pollution Control (U.S. Dept. H.E.W.) where six trained smoke inspectors evaluated a white training plume known to have 0% opacity. All six inspectors rated the plume at more than 0% and 3 evaluated it at more than 20%. A plume known to be 20% opacity was rated higher than 20% by 5 or 6 inspectors (one rated it lower) and 2 of them rated

it at almost 40%. Problems may also be posed for deciding when opacity is due to water content and when it is not." (Emphasis added) 486 F. 2d at 400-401.

As the Court in *Portland Cement* implicitly found, the very nature of the tests and in particular the manner in which they are made, clearly demonstrates that they are imbued with a constitutionally impermissible degree of arbitrariness and capriciousness to serve as standards. The former Act prescribed two methods for determining violations. Section 66-29-5 (2) (b) precluded the discharge into the atmosphere of a contaminant "As dark or darker than the shade as that designated as No. 2 on the Ringelmann Chart, as defined in Section 3 of the Act"; Section 66-29-5 (2) (c) stated that no person shall discharge into the atmosphere any contaminant "Of opacity equal to or greater than smoke described in Paragraph (b) of this subsection." In other words, it is unlawful to discharge any contaminant other than smoke which is more opaque than its equivalent on the Ringelmann Chart. Both tests are visual determination standards. Respondent is alleged to have violated the equivalent opacity section. Its discharges, consisting mostly of steam, were white in color and were therefore not susceptible to a Ringelmann reading, as the Ringelmann Chart applies only to black or very dark smoke.

The Ringelmann Chart was first brought to the United States from Paris, France, the residence of its inventor, Maximillian Ringelmann, and since 1904 has been incorporated into various pollution control ordinances. It was for many years the only air pollution test available. Respondent submits that the test's exclusivity, rather than its scientific merit, has been responsible for its judicial acceptance to date, and asks this Court to give serious con-

sideration to the following discussion, particularly in view of the fact that there now exist numerous widely used tests of an objective and scientifically accepted nature which invalidate the basis of the acceptance of visual determination methods.[5] Some, but not all of these are: 1) sedimentation filtration, 2) filtration, 3) impingement, 4) photoelectric, 5) electric precipitation and 6) thermal precipitation. While some of the following scientific points have been raised in previous cases, none of those unsuccessful attacks on visual determination standards have been made utilizing the constitutional arguments presented here and in the particular factual context of this case.

The most recent edition of the chart consists of a circular piece of paper divided into six sections numbered from zero to five. Section zero is completely white; Section five is completely black and Sections one to four consist of intersecting black lines on a white background. Some charts omit either both or one of the totally black/totally white sections. The black lines are narrow on Section 1 and become progressively wider through Section four. Originally the chart was posted at a distance of 50 feet or more from the observer, and when so posted, the black lines and the white spaces supposedly merged into each other by a process of optical illusion, so as to present the appearance of a series of gray areas of differing shades. Recent editions of the chart have consisted of small hand-held models that are to be read at arm's length. It is arbitrarily assumed that the optical illusion produces grey areas of varying shades identical in every case irrespective of the eyesight and/or arm length of the particular inspector. In addition, some charts give the equivalent opacity for black or dark emissions by correlating color to visual density, e.g., a reading of

---

5. Henz, "The Ringelmann Numbers as an Irrebuttable Presumption of Guilt—as Outdated Concept." 3 Natural Resources Lawyer 232, May, 1970.

two (blackness) on the Ringelmann Chart translates as a 40% equivalent opacity. Equivalent opacity also applies to white emissions. The Ringelmann Chart looks to color (the denser the smoke, the blacker it is) and equivalent opacity looks to the amount of light which passes through a non-black emission. (The denser the emission, the less light it permits through.) Estimates of the visual density of black or dark emission may be made by glancing from the chart to the emission and picking out the section of the Chart which most nearly resembles the emission. The equivalent opacity reading here was made without a chart on the basis of comparisons with plumes observed in a smoke reading school conducted by the State. As the chart intrinsically is incapable of applying to white emissions, opacity for such emissions can only be detected by direct and unaided observation, unless, presumably, more sophisticated equipment is used.

Equivalent opacity measures the darkness, or visual density of a column of smoke or any other emission. In short, this is the amount of light that passes through the column. A priori, a visual observation of the given quantity of air contaminant emitted into the air in a given time is subject to an infinite number of Ringelmann and/or equivalent opacity determinations based upon the following factors: the amount of available light, which in turn is dependent upon cloud cover, time of day, humidity, other atmospheric haze, and the seasonal relationship of the earth and the sun, the relationship of the observer to the source of available light, the wind velocity, and the compactness or diameter of the column of smoke, which, in large measure is determined by the diameter of the stack from which it issues. Without regard to actual quantity of contaminants, the more compact a given amount of contaminant the greater is its visual density, and therefore its Ringelmann or equivalent opacity readings. Conversely, the more dis-

persed a given amount of contaminant, the less its visual density, and therefore its Ringelmann or equivalent opacity readings. In addition, there are several other factors peculiar to the dehydrating industry discussed at p. 52, infra. Each of these factors and the combinations and permutations thereof, leads to different opacity measurements of a given quantity of air contaminant passing into the air in a given amount of time. Visual sightings with or without the Ringelmann Chart cannot, in any way, take into account all of these factors so as to arrive at an objective determination. The visual observations and correlations resulting therefrom are based solely upon prior observations at the smoke reading school which observations, were intended to serve as a model in the inspector's memory and as a comparison for what actually is observed in the field, irrespective of the above mentioned factors.

"Density", when used in air pollution work has been defined by Lionel Marks as the volume of soot or other particulate matter in each cubic foot of gas which escapes from a stack.[6] This is actual density, as opposed to the visual density measured by the visual determination tests. Obviously, the more narrow the stack, the more compact is the given quantity of contaminant passing up the stack, and the greater the visual density. This demonstrates that the widespread belief that the appearance of smoke is an indication of actual density is entirely fallacious. Marks, in a section entitled "Inadequacy of the Ringelmann Chart", which applies to equivalent opacity readings as well, conducted several experiments under controlled conditions which substantiate the statements contained in the preceding sentence. For example, smoke of the same actual density was emitted simultaneously from stacks 3 feet in diameter and 12 feet

---

6. Marks, Lionel, *Standard Handbook for Mechanical Engineers*, 7th Ed., McGraw-Hill Book Co., New York, 1969.

in diameter. The Ringelmann readings were No. 5 for the 3-foot stack and No. 1 for the 12 foot stack. In other words, the visual density of a column of smoke and therefore the chance that it will violate Colorado standards is inversely proportional to smoke stack diameter. The greater the diameter of the stack, the less chance there is of violating the Act. To say that one industrial concern has violated the Act because it emits a given quantum of air contaminant in a given time period through a stack 3 feet in diameter is absurd when another industrial concern could emit an identical amount of air contaminant in an identical time period through a stack 12 feet in diameter without violating the Act. Another experiment substantiated Marks' conclusion regarding the relationship of stack size to visual density. Four glass tubes of varying diameters were filled with water to identical heights. Fifteen drops of India ink, consisting of soot suspended in a liquid, were added to the largest tube and well stirred. Identical amounts of the resulting mixture were then poured into the remaining tubes with the effect being that the Ringelmann readings of the liquid smoke increased as the diameter of the tubes decreased, even though the actual amount of particulate in each tube was identical. As Marks said, "These demonstrations indicate clearly that a visual determination of smoke density has no significance in terms of actual smoke density."

The E.P.A conducted field testing programs to characterize particulate emissions from alfalfa dehydrating plants and to evaluate the cost/effectiveness of available control methods. Their conclusion corroborates Respondent's contentions regarding the lack of correlation between opacity and quantity.

> "As a consequence of drying, especially overdrying which frequently occurs with high productivity, a

very fine particulate smoke is generated. Although the smoke may constitute only a small mass emission, it scatters light very effectively and may frequently result in noncompliance with visual opacity regulations. Moreover, the smoke readily penetrates conventional medium efficiency control devices making effective control practically impossible. Control of dryer generated particulate emissions is also complicated by the large volume of moist carrier gases.

During the testing program, it was learned that the visual appearance of a plume is not a reliable indicator of compliance with a mass limit regulation. If overdrying occurs at a plant where the primary collector is relatively efficient, the opacity limit might be exceeded even though total mass emissions are in compliance with the mass limit regulation.[7]

Wind has a decided effect on both Ringelmann and opacity readings. On a still day, smoke ascends vertically with a velocity which diminishes as it rises. With a brisk wind, smoke is immediately diluted with air upon leaving the stack with the result that its visual density is reduced. Therefore, an emission with a given actual density issuing from a stack would appear more dense on a calm day than on a windy day.

The background behind the emission as well as the other factors mentioned above can have a decided effect upon the reading. To prove the importance of background on visual determinations, Marks substituted a gray background for a brightly lit, light background in the India ink experiment. The difference of appearance of the simulated

---

7. "Particulate Emissions From Alfalfa Dehydrating Plants -Control Costs and Effectiveness"—Environ. Pro. Tech. Series, EPA 650/2-74-007, Jan. 1974. See particularly Table 16, p. 72.

smoke in the glass tubes was marked, with a darker background increasing the apparent visual density.

Numerous experts have recognized the high degree of subjectivity inherent in a visual determination test resulting from the factors described above, and the test's inapplicability to measuring actual density. Among these experts is the Environmental Protection Agency, whose precursor the National Air Pollution Control Agency, conducted a test which exposed the glaring deficiencies in visual determination tests.[8]

Essex Chemical Corporation v. *Ruckelshaus*, 486 F. 2d 427 (D.C. Cir. 1973) decided several months subsequent to *Portland* dealt with the same issue in an identical manner when it stated:

> ". . . The per cent of opacity present in a smoke plume —and the persuasive challenges on the part of the petitioners, found that further consideration and explanation of the efficiency and objectivity of the test was necessary prior to its adoption as a standard." 486 at F. 2d 432.

In addition the objection was raised as to the EPA's failure to provide that lesser standards or no standards at all should apply during startup, shutdown or mechanical malfunction. The Colorado Act is similarly deficient. The Court stated:

> "We agree that such variant provisions appear necessary to preserve the reasonableness of the standards as a whole and that the record does not support the 'never to be exceeded' standard currently in force. Thus we remand for further consideration of this issue,

---

8. See App. pp. 109-111, concerning Optical Properties and Visual Effects of Smoke Stack Plumes, Pub. Health Serv. Pub. 999-Ap.-30 (1967 National Tech. Info. Serv. PB-174-705) at 28.

noting that the proposed regullation should plan an integral role in any reconsiderattion." 486 F. 2d at 433.

The application of visual readings to respondent's alfalfa dehydration industry poses even more problems. In the dehydration process, freshly cut alfalfa is dried with the heat of burning natural gas. Water vapor, as much as 22,000 pounds per hour, is released into the atmosphere. (App. p. 61) Natural gas produces no visual smoke. The emission consists wholly of steam and some minute particles of alfalfa which escape from the dehydration process. Since steam is not a pollutamt by the terms of the former Act, and since water vapor control is not within the purview of the former Act (Section 66-29-3-(5) Col. Rev. Stat.) the enforcement agent readily admitted that the reading of a plume cannot be taken until the water vapor has been absorbed into the atmosphere. On given days, this can be anywhere from a few feet from the top of the stack on a hot afternoon to 1000 yards above the stack on a cool, crisp morning when vast quantities of steam are visible for many miles. The difficullty of reading the plume under these circumstances is obvious, especially in view of the fact that the agent testified that he has received no training in reading stack emissions containing steam.[9] The

---

9. App. p. 119, Mr. James R. Taylor, an air pollution specialist with the Colorado Department of Health, testified:

"Q. Were you ever trained at this school you referred to, or otherwise, in making opacity readings where steam was also present in the source of emission?
A. No, sir. We don't have that capability."

App. p. 130, Mr. Joseph Palumbo, assiistant director, Div. of Air Pollution Control, State of Colorado, testtified:

"Q. You spoke of a trained inspector could make allowance for the presence of steam in emission. Tell me, do you have any device in your smoke school to emit steam so that the inspector can observe it along with the other matter that is being emitted?
A. No, we don't have any method of introducing steam."

smoke reading school did not provide any training whatsoever in distinguishing water vapor or steam, which are non-pollutants. The inspector testified that he would look at the "blue haze at the end" or "at the point of steam dissipating."[10] He did not, however, testify that he had attempted to adjust the visual opacity observed by him for the presence of steam. He testified as to unadjusted opacity reading. How much steam was present was anybody's guess, and apparently the inspector did not even attempt to guess.

A plume containing steam is termed a "wet plume". The Court in *City of Portland* v. *Fry Roofing Co.*, 495 P. 2d 751 (1972) recognized that a wet plume cannot be read where the humidity was in excess of 70%. This is only one more variable that exemplifies the subjective, arbitrary and capricious nature of opacity readings, particularly in the alfalfa dehydrating industry. The Act does not prohibit the reading of a wet plume when the humidity is in excess of 70%, a further example of the constitutionally impermissible lack of adequate procedural standards and safeguards in the Act. There was no testimony that the humidity was such that the reading of the wet plume involved was justified and presumably the enforcement agents, trained at a school where steam emissions were never viewed, were not instructed in the art of fairly viewing an emission of steam.

Opacity readings are subject to another variant, impossible to discount, which renders any determination totally arbitrary. Opacity in effect measures the amount of light passing through a given emission or, in other words, the percentage of a background object which is obscured by the emission when viewed through the emission. The

---

10. App. p. 35.

Act prohibits emissions which in effect obscure 40 percent or more of the background behind the emission. In order to make a proper reading, the inspector must focus on a particular object located behind the emission. The atmospheric haze between the inspector and the emission and between the emission and the background object necessarily is cumulated in his finding. For example, if general atmospheric conditions obscure 20 per cent of the object, a view through the emission which obscured 45 per cent of the object means that in reality the emission in and of itself has an opacity of only 25 per cent. The effect of haze increases as the distance between the inspector and the object increases. For example, on a clear day all of us can see an automobile whether we are standing 5 feet or 100 feet from it. However, in a heavy fog, while the view may be obscured to the extent of 25 per cent from 5 feet, the car may be totally shrouded from 100 feet.

People v. *Plywood Manufacturers of California*, 291 P. 2d 587 (1955) stated that a violation was present "if the contaminant has the substance that, fairly viewed from any position, gives it a shade as dark or darker than Ringelmann No. 2 no matter how light in color it may look to someone situated at another vantage point." The same statement applies to an opacity reading of 40 per cent or greater. Respondent does not take exception to this statement, but emphasizes that, with any visual determination, it is impossible to *fairly view* the emission unless the Act would prescribe visual determination standards pertaining to the conditions required for the emission to be fairly viewed. Such standards are lacking in the Colorado Act and were lacking in the former Act.

Taking given quantities of contaminants passing into the air at the same rate on two different days, totally different visual determination measurements could result be-

cause of the many variants which affect such a reading. It is completely irrational to say that the discharge of a given amount of contaminant over a given time is violative of the Act one day but not the next, because overnight stacks of excessive diameter have been installed from which the given quantity of contaminant emits in a more dispersed form, thus registering a lower visual density. This exemplifies the inherent unreasonableness of the visual determination methods which look only to visual, as opposed to actual density.

Aside from standards of appropriate conditions for employing visual determination measurements, such measurements themselves, unconcerned with quantities of contaminants, work against effective abatement and correction of existing problems. Any party subject to regulation must guess as to what design limitations are placed on any new capital equipment and what degree of cure must be effected upon existing units. There is no method available by which respondent can insure that it will not offend the eyes of any number of certified observers, even assuming that there are no defects in their eyesight. No manufacturer of pollution control equpment will guarantee results based upon Ringelmann or opacity standards.[11] Respondent does not advocate free and uncontrolled use of the atmosphere. There are tests which set a volumetric maximum for a precise method of measuring the amounts of and actual densities of emissions. They are precise and objective, not imprecise and subjective as are Ringelmann and opacity readings.

Nor can it be contended that either visual determination test is semi-quantitative as to the quantity of contaminant being emitted in that, for example, an opacity reading of 80% indicates a greater quantity of contaminant

---

11. App. p. 112.

than an opacity reading of 10%. As has been demonstrated, this would be true only if: (1) the conditions under which the readings were taken were identical, as otherwise different readings could result from stacks of varying diameter or the other factors discussed above, given identical amounts of contaminant from the source per given unit of time; and (2) the density (in terms of weight) of the actual particles in the two readings was identical. Only if the densities are identical can it be said that the actual quantity of contaminant being emitted is also identical. It is possible that an emission permitted under the Act with an opacity reading of 20 per cent contains a greater quantity of contaminant than a prohibited emission with an opacity of 60 per cent, if the former is composed of particles which are more than three times as dense as the latter. Neither opacity nor Ringelmann readings consider the latter factor. Both are concerned only with visual, as opposed to actual density, which actual density is measured in terms of particles of contaminant per given time period from a given source.

2. The Act, in Employing Visual Determination Tests, Has Selected Means Which Have No Real and Substantial Relation to the Object Sought to Be Attained and Is Therefore Violative of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

Even if the tests authorized in the Act for determining the maximum permissible discharges are not in and of themselves constitutionally infirm, they bear no real and substantial relation to the object sought to be attained by the former Act. As this Court announced forty years ago in *Nebbia* v. *New York*, 291 U.S. 515 (1934):

"And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." 291 U.S. at 525.

The object sought to be obtained here is set forth in Section 2 of the Act which reads and provides in its entirety as follows:

"Section 2—LEGISLATIVE DECLARATION—It is hereby declared to to be the policy of the State of Colorado to maintain a reasonable degree of purity of the air resources of the State, which shall be consistent with the public health, welfare, and public enjoyment thereof, the industrial development of the State, the propagation of protection of human, plant and animal life, and the protection of physical property and other resources. To that end it is the purpose of this Act to require the use of all available practical methods to reduce, prevent and control air pollution in the State of Colorado and to maintain a cooperative program between the State and local units of government. It is further declared that the prevention, abatement, and control of air pollution in this State are affected with the public interest and that the provisions of this Act are enacted in the exercise of the police powers of this State for the purpose of protecting the health, peace, safety and general welfare of the people of this State."

It is necessary to examine several definitions contained in Section 3 of the Act in order to accurately interpret the legislative declaration contained in Section 2. Section 3, Definitions, contains, among others, the following definitions: "(5) 'Air Contaminant' means a dust, fume, gas, mist, smoke, vapor (other than water vapor alone), pollen

or any combination thereof; (6) 'Air Pollution' means the presence in the atmosphere of one or more air contaminants in *quantities*, of characteristics, and of a duration throughout the State or throughout such areas of the State as shall be affected thereby, which are injurious to humans, plant, or animal life or to property, or which unreasonably interfere with the comfortable enjoyment thereof." (Emphasis added)

By the very title of the Act and by the wording of the Legislative Declaration, it is clear that the Act is aimed at preventing, reducing, controlling and abating air pollution and maintaining a reasonable degree of purity of the air resources of the State. Implicit in the use of the term "degree" used in terms of air purity is the conclusion that the Act is dealing with quantums of air contaminants in relationship to the total atmosphere. Otherwise, the use of the term "degree" would be meaningless. That the Act does in fact deal with quantums of air contaminants and that such quantums are in fact incorporated by reference into the legislative declaration section of the Act is specifically set forth in the definition of "air pollution." This definition talks of "*quantities*, of characteristics, and of a duration. . . ." It is exceedingly clear that visual determination methods, even discounting their inaccuracy given the infinite variations of conditions which alter observation, are incapable of being accurately translated into a volumetric measure of contaminant and bear no relationship whatsoever to quantities of air contaminants.

The legislative declaration found in the Act must be contrasted with expressions of legislative policy in other acts employing visual determination standards whereupon in subsequent litigation it was not contended that the means bore no real and substantive relation to the end. See, for example, 35 P.S. Section 4002 (Pennsylvania) quoted in

Bortz Coal Co. v. *Air Pollution Comm.*, 279 A. 2d 388 (1971); Sections 24198 and 24199, Health & Safety Code (California), and *People* v. *Detroit Edison Company*, 168 N.W. 2d 320 (1969). The Pennsylvania statute does not mention air pollution or quantities at all but deals in broad generalities. Similarly other statutes, which specifically are for the control of "smoke" or which prohibit the emission of "dense" smoke, do not mention air pollution or quantities of air contaminants. That the visual determination readings permitted in such Acts are appropriate to the end of eliminating dense smoke Respondent does not quarrel. Often such statutes have declared smoke or dense smoke to be a nuisance. However, the former Act in question here repeatedly uses the term "air pollution" which by definition deals in quantities of air contaminants. Respondent submits that the Colorado Legislature, as stated in its declaration of policy, has specifically and intentionally adopted an act to reduce, prevent, abate, and control the quantities of air contaminants in the Colorado air. This is the end sought to be attained by the Act and only by reducing quantities of air contaminants can the air be purified. If the Act does not deal with quantities of air contaminants, then installing stacks with excessive diameters to reduce visual density and not effective pollution abatement equipment is the solution for all industries which find it economically unfeasible to reduce or purify their emissons. As the means selected in the Act for determining a violation of the end sought to be attained deal only with apparent visual densities (as opposed to actual densities) and not with actual quantities of air contaminants, they bear no reasonable and substantial relation to the declared end. The Act is therefore unconstitutional as it deprives Respondent of its property contrary to the Due Process Clause of the 14th Amendment to the Constitution of the United States.

Viewed in another way, the Ringelmann and equivalent opacity tests constitute meritless, irreversible and irrebuttable statutory presumptions that emissions registering in excess of the prescribed standards contain quantities of air contaminants sufficient to violate the Act and/or are inconsistent with the public health and welfare of the state if the Act's end is broadly construed; and, conversely: that emissions which do not exceed the prescribed standards do not contain prohibited quantities and/or are consistent with the public health and welfare. As has been demonstrated this is an irrefutable assumption so arbitrary and unreasonable as to deprive respondent of its property without due process of law. The Act precludes the respondent from ever rebutting the presumption. It provides only the opportunity to contest the determination that a violation exists; that is, whether the emission was in excess of the standards, and not whether such standard is in fact inconsistent with the end of the Act.[12]

Since the Act in prohibiting emissions which are violative of prescribed visual determinations standards, purports to be concerned with quantities of air contaminants, it is forbidden by the due process clause to assess a violation on the basis of a permanent and irrebuttable presumption that emissions in excess of the prescribed standards contain an impermissible quantity of air contaminants when that presumption is often times demonstratively false in fact and when the state has reasonable alternative means for making the crucial determination.[13] Even if the Act purports to be concerned with the public health and welfare and not at all with quantities of air contami-

---

12. See, e.g. *Vlandis* v. *Kline*, ... U. S. ....., 93 S. Ct. 2230 (1973) where a similar, permanent and irrebuttable statutory presumption, which presumption was unnecessary, rendered the statute in question unconstitutional.

13. See, e.g. *Bell* v. *Burson*, 402 U. S. 535 (1971).

nants, it is forbidden by the due process clause to assess a violation on the basis of a permanent and irrebuttable presumption that emissions not in excess of the prescribed standards as opposed to emissions in excess of the State's, are not inconsistent with public health and welfare when that presumption is not necessarily or universally true in fact when no quantitative inquiry is made and when there exist reasonable alternative means of making the crucial test. Standards of due process require that the State allow the opportunity to present evidence which shows that the emission is not inconsistent with the public health and welfare vis-a-vis emissions which do not violate the prescribed standards. Since the Act precludes rebuttal of the presumption, it operated to deprive the respondent of its property without due process of law.

3. Whatever the End Sought to Be Attained by the Act, a Finding of Liability for Its Violation Based upon a Visual Determination Test Is Unreasonable and Therefore Violative of Due Process.

The United States Court of Appeals, Second Circuit, in *Pearson* v. *Northeast Airlines*, 309 F. 2d 553 (1962) stated that an unreasonable or unreasoned imposition of liability was violative of due process. Whatever the purpose of the Act, any emission source is subjected to an unreasonable imposition of liability because of the nature of the visual determination tests which serve as a basis for imposing the liability. To impose a penalty or issue a Cease and Desist Order on the basis of visual determination tests is totally unfair. If the Act is concerned not with quantities of air contaminants, but with the mere presence of air contaminants over and above that permitted by the visual determinations standards, then it must be assumed that emissions in excess of the prescribed

levels are not consistent with public health and welfare, and, to the contrary, emissions not in excess are permitted as being consistent with the public health and welfare. As has been demonstrated this is entirely fallacious for several reasons:

1) With visual determinations standards measuring only visual density, emissions in excess of the permitted opacity may often have a lesser quantity of air contaminant than an emission in excess, thus rendering nugatory the contention that emissions not in excess are consistent with the public health and welfare while emissions in excess of the prescribed levels are inconsistent.

2) The visual density of an emission bears no relationship to the quantity of contaminant contained in that emission.

Opacity, without reference to quality or quantity, is meaningless to the improvement of the air for the benefit of the public health and welfare. Without regard to quality,[14] the question is one of what emissions will be

---

14. It is puzzling that the quality of the emission is not a concern to the state. The former Act made no inquiry whatsoever into the nature and composition of emissions. Obviously, a highly toxic emission representing an immediate threat to the populace should be dealt with quickly and severely, but if it is colorless or does not violate the visual density standards, it is not prohibited, notwithstanding the fact that its threat to the environment greatly exceeds that of other emissions which may be prohibited.

The emission of all foreign substances could be prohibited, but as long as some are permitted the standards employed in making this determination should rest on reasonableness and not caprice.

Mr. Taylor, the Department's Air Pollution specialist, testified at App. p. 36.

"Q. I think you indicated you made no analysis of whatever it was you were seeing coming out from the stacks?
A. No, we haven't.
Q. That's been sent to any chemical laboratory to determine what is in it?
A. No."

prohibited. A dividing line must be drawn if some emissions are permitted and that line states what emissions will be permitted as being compatible with economic interests and public health and welfare and what emissions will be prohibited as being incompatible with public health and welfare. Opacity measures only the percentage of light passing through an emission. It makes no reference to its quality and has no demonstrable relationship to the quantity of the discharge. The opacity of any emission of a given quantity of contaminant is directly proportional to the pressure or compactness of that emission which in turn is basically a function of stack diameter. It is ludicrous to prohibit an emission of a given quantity per given unit of time when an ever greater quantity per given unit of time is permitted because its opacity is less than the prescribed maximum because it issues from a larger stack. This vividly demonstrates the irrationality of the Act in terms of protecting the public health and welfare. While one source that emits in violation of the Act is penalized because its emission is declared to be inconsistent with public health and welfare, one whose emissions contain greater quantities of contaminants and are therefore more damaging to the public is not penalized. Unless all emissions are prohibited, the imposition of liability based upon a dividing line which has as its end the preservation of the public health and welfare can only be reasonable if it is based upon some quantitative or actual density standard as opposed to a visual standard. The public is harmed by quantities of air contaminants and not by high visual densities.

This is not the situation where a speeder, apprehended while traveling five miles in excess of the posted limit, pleads his innocence because immediately prior to his apprehension, he was passed by three other automobiles that

were traveling twenty miles in excess of the posted limit. There all automobiles were in violation of the law. The question was merely one of apprehension, and nonapprehension does not excuse a violation. Here, even though one source can do greater harm to the public health and welfare by emitting a greater quantity of air contaminant, it is not in violation of the law as long as the visual density of that emission is within the prescribed opacity limits. By merely increasing stack size, a source previously in violation can emit a greater quantity of contaminant and do greater harm to the public and yet exculpate itself from further liability.

When this situation can be averted by stack tests measuring particulate emission, it is even more evident that the imposition of liability is unreasonable. The means of alleviating this unreasonable imposition are at hand, are feasible, are widely used and accepted and therefore show not only that the imposition of liability on the basis of opacity tests is unreasonable but also unnecessary.

VI. CONCLUSION

For the reasons stated above, the judgment of the Colorado Court of Appeals should be affirmed.

Respectfully submitted,

GEORGE D. BLACKWOOD, JR.
PHILIP B. GREEN
Floor Three Columbia Union Bank Building
900 Walnut Street
Kansas City, Missouri 64106

DONALD D. CAWELTI
990 Public Service Company Building
Denver, Colorado 80202
Attorneys for Respondent

Of Counsel:

LINDE THOMSON VAN DYKE FAIRCHILD & LANGWORTHY
Floor Three Columbia Union Bank Building
900 Walnut Street
Kansas City, Missouri 64106

LEE, BRYANS, KELLY & STANSFIELD
990 Public Service Company Building
Denver, Colorado 80202